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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 476

GOLDIE B. PRASHKER, Executrix of the Estate of Nathan Prashker, deceased, and CHOICE EMBROIDERY & LACES, INC.,

Petitioners,

v.

BEECH AIRCRAFT CORPORATION and ATLANTIC AVIATION CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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OCTOBER TERM, 1958

No.

GOLDIE B. PRASHKER, Executrix of the Estate of NATHAN PRASHKER, deceased, and CHOICE EMBROIDERY & LACES, INC.,

Petitioners,

v.

BEECH AIRCRAFT CORPORATION and ATLANTIC AVIATION CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Goldie B. Prashker, Executrix of the Estate of Nathan Prashker, deceased, and Choice Embroidery & Laces, Inc., respectfully petition that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on July 21, 1958, and the order of said court denying rehearing entered on August 8, 1958.

Opinions Below

The opinion of the District Court for the District of Delaware is not reported. It is printed in the appendix to appellants' brief, below, at pages 295a-299a. The opinion of the Court of Appeals for the Third Circuit has not yet been reported. It is printed in the appendix hereto, *infra;* pages 1a-13a.

Jurisdiction

The judgment of the Court of Appeals was entered July 21, 1958 (*infra,* p. 14a). The order denying rehearing was entered on August 8, 1958 (*infra,* p. 14a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Forty-five Beechcraft Bonanza airplanes disintegrated in the air in the same manner and for the same reasons as the Prashker airplane, killing all occupants in each instance. The Bonanza's rate of structural failure, as compared with all other single-engine civil airplanes, was a startling 15 to 1.

   A. Was it not strange and alarming error for the court below to affirm the exclusion of this evidence? And was it not a mystifying failure to apply local law?

   B. Are the estates and dependents of pilots killed in these accidents to be denied their right to jury trial by the device of holding other accidents "irrelevant"?

   C. Can the opinion of a leading aerodynamicist that the accidents demonstrate the improper design and dangerous characteristics of the airplane be disregarded, as a matter of law, by the court below?

2. Was not the direction of a verdict on the "alternative" grounds of contributory negligence as a matter of law and failure to prove negligence a shocking denial of petitioners' constitutional right to trial by jury that warrants the exercise of this court's supervisory powers?

3. Is the manufacturer of an airplane insulated from liability for its failure to give necessary warnings and for its negligent design by approval and certification of that airplane by a federal agency?

Constitutional Provision Involved

Constitution of the United States, Amendment VII:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law."

Statement of the Case

There are approximately 5,000 Beechcraft Bonanza airplanes registered. About one out of every sixty manufactured has come apart in the air, killing all occupants (one to four people in each case).[1] According to petitioners' proof, which was largely confined to the Prashker accident and the forty-five instances that preceded it, these accidents were caused by the airplane's unique and dangerous combination of flying characteristics (or "handling qualities") which, under certain conditions, disorient a pilot, make him sick, lead him to lose control of his airplane, and through the force that he exerts on his "stick" or rudder control, lead him to impose huge loads on the

[1] As of December 31, 1957 seventy-nine Bonanzas had come apart in flight.

wings which cause structural failure. The accidents have involved pilots of all degrees of experience.

Statistically, petitioners discovered and tried to prove that the Bonanza suffers structural failure in flight at a rate fifteen times the rate of all other single-engine civil aircraft.[2] A comparison between the number of Bonanza structural failure accidents and the number of all others indicates that for all practical purposes the Bonanza, which is the only airplane certificated to make use of the unique "V" tail, is the only type or model airplane that has come apart with anything more than isolated frequency.

Despite the obvious and frightening danger in the airplane, the Bonanza, at least through the time of the Prashker accident, continued to be manufactured with the same design defects and without significant corrective changes.

The Bonanza conforms to the standards of the Civil Air Regulations, promulgated by the Civil Aeronautics Board (14 C.F.R. Part 3). It has been and is certificated and approved by the Civil Aeronautics Administration, largely because it conforms with the standards of the Regulations (23c-26c).[3]

Despite Civil Aeronautics Administration approval, the respondent Beech, saw fit, in 1947 and 1948, to warn Bonanza users of the structural failure in flight possibility in Bonanzas. Detailed accident reports, sometimes in hair-raising language were sent out to all Bonanza users (PX 64-65, 341a-364a, 320a-323a). This policy, although itself inadequate to meet the danger, was discontinued in October, 1948, largely because of the pressure from dis-

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[2] This rate is based on a simple comparison of the number of structural failure accidents with the number of aircraft registered for a six-year period through the year of the Prashker accident, and year by year through that period. The court below, while ruling this evidence inadmissible, admitted it was "startling."

[3] References are to the appendices to the briefs below, unless otherwise indicated.

tributors and salesmen (320a, 321a, 323a). Nathan Prashker, the deceased pilot in this case, had not been given these warning letters, and had not been told about any of the forty-five accidents that preceded his (17a).

This action arises out of the 46th almost identical instance of structural failure in flight of a Bonanza. It involved Bonanza N-2168D, which was being flown by Nathan Prashker and was owned by Choice Embroidery & Laces, Inc. This action was brought by Prashker's estate and Choice, for wrongful death, survival, punitive, and property damages against the respondents, the manufacturer and distributor of the airplane. It is based both on negligence and breach of warranty.

Petitioners' Claims

Petitioners sought to prove that the Bonanza had an oscillation characteristic (sometimes called a "fishtailing" or "weaving") in air with any degree of turbulence. The oscillation was of a unique type—creating accelerations (rates of changes of speed) which would disorient a pilot and make him physically ill. Coupled with this oscillation-acceleration characteristic was the second major factor—an extremely rapid rate of speed build-up in a nose-down attitude. Thus if the nose, or front of the airplane, tips down (itself a result of the oscillations) the airplane picks up speed very rapidly. Finally, at the high speeds which this plane would attain, a light touch on the stick would create huge loads on the structure, tearing it apart. As indicated, it was the *combination* of these characteristics which, in their interaction, made the Bonanza peculiarly subject to disintegration in flight.

Petitioners claimed that respondents had failed to give warning of the great danger in the airplane; indeed that they had failed to give warning, required by the circumstances of the large number and high rate of prior acci-

dents. They claimed dissemination of false information about the airplane—that it was safe from a structural standpoint, when, in fact, it was known by respondents to be especially dangerous. In addition, they claimed negligent design, as indicated above, and, more important, a failure to correct the bad design, or add safety devices such as dive brakes, when the airplane was known to be unsafe.

The principal basis for petitioners' claims was evidence of the prior accidents and statistical comparison of failure mentioned above. Aside from being the most important proof of notice to Beech, it was the basis for expert testimony that the cause of the Prashker accident lay in the characteristics of the Bonanza. Petitioners' expert witness, Dommasch,* in testimony later stricken because it was based in part on prior accidents which had been excluded, testified that the explanation of these accidents lies "in the characteristics of the airplane which can induce it to, let us say, disorient a pilot, and also to bring its nose down rather rapidly without his awareness of this situation" (235a). Again, "that the peculiar handling qualities of this airplaine • • •" would cause "• • • the nose to drop out and the pilot to become disoriented. And under these conditions there is very little else he could do at low altitude but pull the wings off when he recognized his plight" (236a, 237a).

* Daniel O. Dommasch is one of the world's leading aerodynamicists. He is chief of three authors of "Airplane Aerodynamics," which is the standard work on aerodynamics in aeronautical schools today, and he is the author of three other books in the field of aeronautics. He set up the flight test program for the N.A.T.O. nations. He organized and established the curriculum of the Navy's test pilot training division at Patuxent. He is former engineering coordinator (on a level with chief engineers of Bell Aircraft Company, former project engineer of the Civil Aeronautics Administration, former professor at Princeton University in aeronautical engineering, and he has been a consultant to many leading aeronautical companies (137a-143a, 145a-146a, 233a).

The District Court refused to admit any accident reports or statistics, on the issue of causation, and admitted only seven reports on the limited issue of notice. The Court of Appeals affirmed the exclusion of this evidence on the unbelievable ground that it was "irrelevant."

The Accident

The accident herein occurred on October 5, 1953, only seventeen minutes after Prashker took off from Allegheny County Airport (south of Pittsburgh) on a 42 minute flight, northwest, to Cleveland (62a, 76a, 301a, 308a). Although the takeoff was in a northwest direction, the crash was eight miles *southeast* (62a, 76a).

The takeoff was normal. Prashker was seen flying about three miles northwest (310a). He was not seen nor heard from until eleven minutes later, at which time he called the Allegheny tower to say "he was over the city at 2300 feet, *unable to maintain VFR*,[5] and was going to climb" (308a). It was conceded by the court below to be inferrable that prior to making this radio call Prashker had turned around from his course to Cleveland to avoid worsening weather condition ahead (opinion, *infra*, p. 6a), and that he was trying to return to Allegheny County Airport (310a, 311a).

Within four minutes, ground witnesses at the scene of the crash "saw a wing fall off an airplane" and saw the plane crash to the ground (63a, 76a, 312a). There is no

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[5] The "City" referred to Pittsburgh, and "2300 feet" referred to the height above sea level, shown on Prashker's altimeter, as distinguished from height above the ground. The Civil Air Regulations (PX 25) prevent flight at less than one thousand feet over a City or populated area. "VFR" refers to Visual Flight Rules, specified in those regulations, said flight to be conducted by visual reference to the ground, objects or clouds (42a, 44a) as distinguished from reference to instruments.

question but that in that four minute period Prashker became anxious and excited, that he was disoriented and lost, that he lost control of the airplane and imposed loads on its structure that it could not withstand. This was asserted by petitioners as the result of the unique and dangerous flying characteristics of the plane. Petitioners tried to prove that on the 45 prior occasions pilots with all degrees of experience, ranging from novices to experienced instrument pilots with a perfect right and all the necessary qualifications to fly in instrument weather, had lost control, and, like Prashker, had pulled their airplanes apart in precisely the same way he had.[6]

The Civil Air Regulations prescribe certain conditions of ceiling and visibility without which a non-instrument pilot may not fly (14 C.F.R. 60.30, 60.31, PX 25). They also provide that in emergency situations the pilot is free to disregard regulations and act in the interest of immediate safety (14 C.F.R. 60.2, PX 25).

When Prashker took off from Allegheny the weather there was indisputably well above VFR requirements (41a, 304a). Furthermore, the reported weather at Greater Pittsburgh Airport, along the way, and at Cleveland, his destination, which was the only weather information available to Prashker, showed substantial and increasing improvement along the route. (63a, 64a, 294a, 304a, 314a).[7]

There was no specific evidence as to whether Prashker had actually checked the weather prior to his departure, but this was inferrable from the fact that he filed a VFR flight plan, demonstrating his belief that the weather along

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[6] Eleven of the 45 pilots were qualified instrument pilots (See accident reports, 260a-261a, PX 52).

[7] The District Court refused to admit evidence of the reported Cleveland weather. The court below recites this evidence, however, as though it were admitted (Opinion; *infra*, p. 2a).

the route met VFR requirements (301a, 307a-308a). There was also evidence that it was Prashker's regular practice to check the weather (11a).

Prashker concededly had no instrument rating (8a). He did have considerable instrument training, however (9a, 11a, PX. 3). He was described by his brother, also a pilot, as "a very capable pilot, a very safe pilot" (8a). He knew the dangers of flying in bad weather (17a) and his training was such as would help him avoid bad weather if that were possible (18a).

Rulings of the Courts Below

At the close of the plaintiffs' case, the District Court directed a verdict for the respondents (a) in the claims based on negligence, on the ground that the deceased pilot was guilty of contributory negligence as a matter of law, (b) in the claim for breach of warranty against the distributor, on the ground that decedent's negligence bars a recovery, (c) in the claim for breach of warranty against the manufacturer, on the basis of lack of privity under Kansas law, and (d) in the claim against the manufacturer for punitive damages on the ground that there was insufficient evidence.

On appeal by the petitioners to the Court of Appeals, that Court affirmed, but on somewhat different grounds. While stating that the petitioners' position, on the question of contributory negligence, was "arguable", it relied "also on an alternative ground for decision", that the plaintiffs failed to prove negligence and breach of warranty. As indicated, the court affirmed the exclusion of evidence of other accidents and the comparative rate of failure on the ground of "irrelevancy".

REASONS FOR GRANTING THE WRIT

1. Holding the prior Bonanza disintegration accidents and the Bonanza's disparate rate of failure "irrelevant" was gross and shocking error, a violation of local law, in conflict with other decisions of the court below, and a deprivation of jury trial.

As to Prior Accidents

The court below has decided, as a matter of law, that the prior accidents were caused by pilot fault, and that, therefore, they were "irrelevant" to the issue of whether the Bonanza was unsafe, and whether its characteristics caused the Prashker accident (Opinion, *infra*, p. 11a). This finding is in direct contradiction to the petitioners' expert proof that the accidents were not caused by pilot fault, but rather by the characteristics of the airplane. (See Dommasch testimony, quoted *supra*, p. 6). The court below has, in effect, set itself up as a super-engineer who can read aircraft accident reports with eyes more skilled than those of a leading expert in the field.

The court has concluded that no inferences whatever may be drawn from the fact that an airplane comes apart in the air "because of the compromise required with structural strength in designing an aircraft which will get off the ground" (Opinion, *infra*, p. 11a). It has not only ignored common sense, but has ignored the direct testimony to the contrary of a man whose life's work has been devoted to aircraft design (See Dommasch testimony, 272a; and transcript, pp. 1887 and 1952).

The finding of the court below that the accidents were "irrelevant" defies understanding. Instances of structural failure in flight in Bonanzas are obviously relevant to the Prashker instance of structural failure in flight in a Bonanza, particularly when an expert specifically says

so, (235a, 251a, 271a).. True, respondents may attempt to explain these instances and distinguish them from the Prashker accident. But a court may not hold that they are "irrelevant" as a matter of law.

Indeed, these reports of other accidents were more than relevant to the issue of causation. They were necessary! Asked "what material do you as an engineer require to analyze the Prashker accident and come to a conclusion on the cause of the Prashker accident," Mr. Dommasch replied "a study of similar circumstances of similar occurrences if they exist" (170a). He added, "this is an essential ingredient to my analysis of the Prashker accident" (171a).

The District Court refused to admit any of the accident reports on the issue of dangerous condition and causation. Since this was essential evidence its exclusion effectively prevented petitioners from introducing specific expert proof on causation. This determination by the District Court, along with the exclusion of all other related evidence on the ground of "irrelevancy," was affirmed by the court below.* It was in stark violation of the law of Pennsylvania where the accident happened, the law of Delaware, where the case was tried, and other decisions of the Court of Appeals.

In *Fisher* v. *Pomeroy's, Inc.*, 322 Pa. 389, 185 A. 296 (1936), and *Baker* v. *Hagey*, 177 Pa. 128, 139, 140, 35 A. 705 (1896), the Supreme Court of Pennsylvania clearly

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* The court below went even further, and impliedly held that even the admission of evidence of seven accidents, on the limited issue of notice, was not warranted. This was in direct contradiction to the Court's holding, in *DeEugenio* v. *Allis-Chalmers Mfg. Co.*, 210 F. 2d 409, 414 (C. A. 3, 1954), citing *Baltimore & Ohio R. R.* v. *Felgenhauer*, 168 F. 2d 12, 17 (C. A. 8, 1948), and was contrary to clear Pennsylvania Law. *Muller* v. *Kirschbaum Co.*, 298 Pa. 560, 148 A. 851 (1930); *Schok* v. *Pennsylvania Edison Co.*, 331 Pa. 524, 1 A. 2d 680 (1938); and *Reid* v. *Lintz*, 206 Pa. 109, 55 A. 849 (1903).

held that evidence of prior occurrences was relevant and admissible on the issues of the existence of a dangerous condition, and causation.

Potter v. *Natural Gas Company*, 183 Pa. 575, 590, 39 A. 7 (1898), to the same effect, has striking significance to the question at bar. *One* prior instance, in which a pipe laid by defendant at the side of a highway had, through a scraping sound made by the wheel of a cart passing over it, frightened a horse and caused him to jump, was held admissible. The court said it was relevant to determine whether the pipe, in its position on the road, was dangerous to travelers by horse and vehicle; that if it excited fear in an ordinarily gentle horse, it was part of plaintiff's case to prove it; that if the plaintiff's horse in the case then at bar had jumped only because it was exceptionally excitable, the defendant was not bound to foresee the danger and guard against it.

In the instant case petitioners were obliged to show that the accident was caused by the dangerous characteristics of the Bonanza airplane, rather than by any improper conduct on the part of Prashker. The proof of the prior accidents, which involved pilots of all degrees of experience, including pilots with air transport ratings, instrument ratings, and commercial licenses, was clear demonstration that the Prashker accident, as well as the others, was caused by the airplane rather than the pilot.

In *Patton* v. *B. & O. R.R. Co.*, 197 F. 2d 732, 739 (C. A. 3, 1952), the plaintiff's decedent had been killed by four runaway gondola cars. The case was based upon negligence in maintenance of brakes on the defendant's cars. Employees of the railroad yard where the accident had taken place testified to prior incidents where handbrakes on B. & O. cars proved inadequate, and wouldn't hold. The court, which was the same court, though a different panel of judges as the court below, held that this was not error despite the fact that the particular four cars involved in the accident were not singled out.

In *Hadley* v. *B. & O. R. Co.*, 120 F. 2d 993, 995 (C. A. 3, 1941), cited in the *Patton* case, the Court said, at page 995:

> "Furthermore the testimony qualified as relevant and material under the general rule that 'the fact that a given result recurs continually and frequently while but one cause remains constant, is *strong* proof that such cause produces the result in question * * *'. *Henry Pennsylvania Trial Evidence, 3rd Ed. 33.*"

In *Dimenco* v. *Pennsylvania Railroad Co.*, 19 F.R.D. 499 (D. Del., 1956), Chief Judge Leahy stated (p. 501):

> "A survey of authority indicates evidence of other accidents and near accidents admissible to show dangerous character and notice provided the nature of the subject matter is in issue and provided substantially similar conditions establish its probative value."

At page 503, he said:

> "I therefore find evidence of prior accidents and near accidents relevant and material and therefore admissible under proper instructions, not as direct evidence of the fact of negligence, but to show the dangerous character of the crossing, notice to the defendant, and failure thereafter to take proper precautions; evidence of subsequent accidents and near accidents, though not logically determinative of notice of a prior condition, may be admissible to show existence of dangerous character and failure to take proper precautions."

As to Statistics

The court below affirmed the exclusion of the statistical proof in very sweeping terms. It stated (Opinion, *infra*, p. 12a):

> "As to the issue of causation by a design defect, the statistic tends to prove nothing more than the

individual accident reports. It is extremely dubious, in fact, whether statistics involving probabilities as to causation have any significance at all when applied to a particular incident."

If the court is correct, one wonders how such uniformly accepted "statistical" evidence as expectancy of life tables are admitted. Actually, petitioners' "statistics" were very simple. They consisted of CAA and CAB information on the number of airplanes registered and the number of structural failure accidents. The Bonanza's rate of failure was 15 times the rate for all other airplanes, by a simple comparison.

In *Wright* v. *Carter Products Inc.*, 244 F. 2d 53, 56, 57 (C. A. 2, 1957), a recent manufacturer's liability case involving the duty to warn, the defendant sought to establish the safety of its product, by a statistical analysis of the incidence of injury. The District Court relied very heavily upon the small incidence in finding in favor of the defendant. The Court of Appeals, in reversing the District Court inferentially acknowledged that the statistic had probative force, although not the force given to it by the lower court.

In affirming the exclusion of the statistical proof, the court below applied an incomprehensible logic. The court has said that since the statistics are based in part upon Bonanza accidents which are irrelevant (since, as a matter of law, the accidents were caused by pilot fallibility) the statistics are also irrelevant. The court itself admits the statistic is "startling" (*infra*, p. 12a).

The statistics show that for any and all reasons the Bonanza comes apart more than fifteen times as often as all other aircraft. They consider *all instances of structural failure in flight in single-engine civil airplanes.* Their effect is to eliminate extraneous and contributing factors of causation, such as pilot fault, and to evaluate the rela-

tive safety of the Bonanza. The statistics demonstrate the *falsity* of the assumption made by the court below—that the Bonanza accidents were caused by pilot fault. In a sense, the statistics provide further proof that the particular accident reports were admissible on the issue of dangerous condition and causation.

This evidence was probative of the questions of negligence, causation, and contributory negligence, since it demonstrated that it was the airplane and not the pilots that *caused* these accidents; and since it furnished the basis for expert proof to the same effect. The effect of its shocking exclusion was to deny petitioners their constitutional right to trial by jury.

2. The direction of a verdict on the "alternative" grounds of contributory negligence as a matter of law and failure to prove negligence was a shocking invasion of the jury's function, a denial of petitioners' right to jury trial, and in conflict with standards well settled by this Court.

Even without the important evidence of the other accidents, petitioners were clearly entitled to go to the jury in their claims of negligence and breach of warranty. This right has been denied them on the "alternative" grounds that (1) the decedent was guilty of contributory negligence as a matter of law, and (2) "no negligence can be imputed to the defendants" (Opinion, *infra*, p. 7a).

a. Contributory Negligence as a Matter of Law

It is not entirely clear whether the court below did or did not base its decision on contributory negligence. The court said, *infra*, p. 7a:

> "A decision based on Prashker's contributory negligence alone would depend on a preliminary holding that the evidence would not support an inference that

> bad weather may have closed in on him even though he was exercising due care for his own safety. We incline to the view that no such inference is available, but concede that the question may be arguable. Therefore * * * we prefer to rely also on an alternative ground for decision. We think that no negligence can be imputed to the defendants."

How can the question of contributory negligence be "arguable", and still not be left for the jury? In *Schulz v. Pennsylvania Railroad Company,* 350 U. S. 523, 76 S. Ct. 608 (1956), this court, citing the Seventh Amendment's *guarantee* of the right to trial by jury, and having "granted certiorari to consider the failure of the District Court to let this case go to the jury, 350 U. S. 882," stated (p. 526):

> "The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable."

The charge that Prashker was guilty of contributory negligence rests entirely on the proposition that he wilfully flew in instrument conditions while not possessing an instrument rating. The only specific indication of what he did, however, is set forth in his own words on the control tower radio—that he found himself "unable to maintain VFR," and that he was "going to climb" (308a).

The court below admits that it is "inferrable from the time intervals involved" that before giving this message, and shortly after taking off from Allegheny County Airport, Prashker encountered worsening conditions, and turned back (Opinion, *infra,* p. 6a). This, of course, is the conduct of a reasonable, safe, pilot, who, after taking off in weather that is well above VFR requirements, and headed in a direction where all available weather reports show substantially bettter conditions, finds that the weather ahead of him is worse than he had a right to expect. He turns, in an attempt to return to the airport of his de-

parture, but finds himself trying to return through an area where the weather has deteriorated, and over a city, where Regulations forbid him from flying at less than 1,000 feet. He cannot go down. On his own statement he cannot maintain VFR at his level of flight. He does what, indeed, is the safest thing for him to do. He indicates to the tower controller (the aviation equivalent of a policeman on the ground) that he is going to climb so that the tower may warn other aircraft of his presence; and he does climb, to get as much space between himself and the ground as possible, and in the hope that he will find clear weather above.

Even if Prashker's conduct was not aided by a very strong presumption of due care on the part of a decedent, its every move (from his turning from his course to Cleveland to his message to the tower) smacks of due care. But, decisive of the question, is the very strong "presumption that the pilot exercised due care for his own safety". *Rennekamp* v. *Blair*, 375 Pa. 620, 101 A. 2d 669 (1954), applying Pennsylvania law, applicable herein, in a strikingly similar situation.[9]

The finding of contributory negligence, if indeed there was such a finding below, is in clear violation of the well settled principle, to which the court below pays lip service, that on a motion for a directed verdict at the close of plaintiff's case all evidence and inferences to be drawn there-

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[9] Respondents advanced the argument below that the mere fact that a VFR pilot flies in instrument weather constitutes a violation of Regulations. This is rebutted by holdings of the Civil Aeronautics Board in proceedings to remove or suspend pilots' licenses, brought by the CAA. The CAB held that mere fact not to be a violation. Rather, the determinative question is whether the pilot knew, in advance, that he would encounter instrument conditions, and continued to fly through those conditions nevertheless, or whether he was confronted with an emergency situation. See *Pope*, 13 CAB Rep. 514 (1950), *Jungersen*, 13 CAB Rep. 544, 553, 554 (1952), and *Jackson*, 13 CAB Rep. 103 (1945).

from must be read in the light most favorable to the plaintiffs. It is also a violation of the principle voiced in *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1945), and followed in Pennsylvania in *Antonelli* v. *Tumolo*, 390 Pa. 68, 73, 132 A. 2d 285 (1957) that it is error to take a case from the jury on the basis of inferences in favor of a defendant, when there are contrary inferences in favor of a plaintiff.

The decision below, if it is based on a finding of contributory negligence as a matter of law, demands exercise of this Court's supervisory powers, for it is a transparent invasion of the jury's province which should be checked here before it gets out of bounds.

b. Failure to Prove Negligence and Breach of Warranty

This Court has no more solemn duty than the protection of the Constitution and the rights and liberties guaranteed by it.

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of Federal jurisprudence which is protected by the Seventh Amendment, a right so fundamental and sacred to the citizen * * * should be jealously guarded by the court."

These are the opening lines of this Court's opinion in *Jacob* v. *City of New York*, 315 U. S. 752, 86 L. Ed. 1166, 1168 (1942), reversing the affirmance of a District Court's dismissal of an action at the close of plaintiff's case upon the ground that plaintiff had failed to prove facts sufficient to justify submitting to the jury the issue of defendant's negligence. Accord *Schulz* v. *Pennsylvania Railroad Co.*, 350 U. S. 523, 76 S. Ct. 608 (1956) which similarly, reversed a directed verdict at the close of plaintiff's case.

There can be no doubt that even without the important evidence of the 45 prior accidents, on the issues of dangerous condition and causation, petitioners far exceeded the minimum requirements of proof of negligence.

(1) *Failure to Warn*

The *principal* allegation petitioners made was that Beech failed to give necessary warnings of a danger and propensity for structural failure in the Bonanza. The District Court admitted proof of seven prior Bonanza structural failure accidents on the limited issue of notice. It further admitted expert testimony that these reports gave notice of a danger, or accident propensity in the Bonanza (248a-251a, 271a, 272a).

Petitioners' expert, Dommasch, testified, on the basis of material admitted into evidence and within the knowledge of Beech, that the seven accident reports "constituted a notice" of the dangerous character of the Beech Bonanza (249a). He said it was "an indication of a pattern of characteristics which induced a certain type of response • • • notice that a group of characteristics of the airplane was such as to make the airplane accident prone under certain types of operating conditions • • • notice that the specific characteristics of this lateral directional oscillation behavior in turbulent air, its ability to drop its nose or, rather to accelerate very rapidly if the nose goes down under these conditions can as a combination produce a set of circumstances which can get a pilot into very serious trouble" (251a. See also 271a, 272a).

There is ample evidence, and it is undisputed, that respondents gave no warnings at all of a particular danger or propensity for failure in the Bonanza, to say nothing of a specific warning of the occurrence of the prior accidents (17a, 21a, 22a, 25a, 29a, 39a, 40a). Thus, even if there were no other evidence of notice in the record than the seven accident reports and Dommasch's testimony, above, petitioners would have established a prima facie case of negligence based upon respondents' failure to warn. Pennsylvania law provides that the nature and degree of the warning given must be proportionate to the nature and degree of the danger itself, *Maize* v.

Atlantic Refining Co., 352 Pa. 31, 41 A. 2d 850 (1945). Involved in these seven accidents was the danger of death, for no one survived any of the accidents. It was obviously for the jury to say if the failure to warn, under the circumstances, was negligence.

In addition, however, there was admitted an aerodynamic report that Beech itself had prepared years before the Prashker accident, which demonstrated knowledge by Beech of the unusual danger in the airplane. The report (PX 72, 368a) considered the rapid rate of acceleration of the airplane in a nose down attitude and the use of dive brakes as a safety device. It states, in part:

> "The model 35 is considered a very high performance airplane for this class of plane yet may be operated by an inexperienced pilot. It has been considered, therefore, that dive brakes might be used as a safety feature and also for the psychological effect on the pilot. For example: if an inexperienced pilot enters a cloud and becomes confused, he might be endangered by the fact that the airplane, if flying 165 m.p.h. and in a slightly nose down condition, can in a few seconds build up to 190 or 200 m.p.h. At this point, 200 m.p.h., the flaps would be automatically extended. Even if the airplane attained a speed of 220 m.p.h. in a few seconds the airplane could still be decelerated to a normal speed without great discomfort or difficulty by the pilot."

Similarly, a second report prepared by Beech (PX 42, p. C-4, 340a) showed Beech's concern with the rate of acceleration in a nose down attitute of the Bonanza, particularly with respect to the possibility of its being flown by inexperienced pilots. It set forth a rate of acceleration which Beech's own Chief of Aerodynamics, Gordon, called to testify by the petitioners, reluctantly admitted was so fast, it was "impossible" (218a-221a).

A report of the National Advisory Committee on Aeronautics received by Beech (PX 22, 340a), stated: "the ease with which the Bonanza airplane can exceed its maximum allowable air speed could make it difficult for an inexperienced pilot to maintain a safe speed." In another place (p. 14) it referred to "the ease with which the airplane can exceed its maximum allowable airspeed *in relatively gradual dives.*" (italics supplied). And in still another section it reported that "as a result of the low damping of the lateral oscillations the Bonanza was subject to continuous oscillations in rough air. * * * The pilot stated that it was impossible to stop these rough air excited oscillations." (118a).

There was also evidence that, in addition to the seven instances of structural failure in flight, there were other instances, known and investigated by Beech, of structural deformation short of complete failure, also caused by the development of excessive loads in flight (316a-317a). With the admitted fact that no warnings of a danger or propensity for failure in the airplane were given Prashker, the finding by the court below that the petitioners had failed to prove negligence, even on the sole basis of failure to warn, is astounding. The court below says (Opinion, *infra*, pp. 8a-9a):

> "Even if it can be said that there is a duty to warn of the dangers in exceeding the inherent restrictions in any aircraft, that duty was adequately discharged by the warnings to avoid instrument flight conditions which would be the only anticipated way the restrictions could be unintentionally exceeded by a pilot."

This finding is a shocking deprival to the petitioners of their constitutional right to have a jury make that determination. It was clearly for the jury to say if the nature of the information given by respondents, none of which pointed to an unusual danger or propensity in the Bonanza, satisfied their duty to warn under the circumstances. See

the striking recent case of *Tampa Drug Co.* v. *Wait*, 103 So. 2d 603 (Fla., 1958) where the court held it was for the *jury* to decide whether a manufacturer of a floor cleaning fluid containing dangerous carbon tetrachloride, which had in fact included a warning on the product's label, had given *sufficient* warning.

(2) *Negligent Design*

The court below virtually ignores petitioners' principal claim of failure to warn and confines its consideration to the claim of negligent design. And, even in doing that, it careens blithely through the evidence, accepting only that view and those inferences that support its conclusion. In this respect also, it is in direct conflict with the principle of *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1945), and *Antonelli* v. *Tumulo*, 390 Pa. 68 (1957), 132 A. 2d 285, that a verdict may not be directed, on the basis of inferences against a party, when there are contrary inferences in his favor.

First, the court below examines the three principal design defects alleged by petitioners *seriatim* despite petitioners' assertion that it was the unique *combination* of these characteristics that made the airplane exceedingly dangerous. The court thus disposes of petitioners' charge that the stick loads were dangerously light, by pointing out that they exceeded military requirements for planes designed to perform even more violent maneuvers than the Bonanza. That military planes generally have much greater structural strength (ability to withstand loads), that they do not have the Bonanza's unique "V" tail which cuts down drag and allows the airplane to pick up speed so rapidly, and that they do not have the Bonanza's unique oscillation-induced accelerations — these things are not mentioned by the court below. Yet it is the existence of these characteristics in the Bonanza that requires high stick forces. In short, it is the *combination* of characteristics that make the Bonanza unsafe.

The court below ignores the fact that the Bonanza's oscillations are of a most extraordinary kind. They produce accelerations (rates of changes of speed) that induce vertigo and disorientation on the part of a pilot (229a-230a, 281a, 285a). Furthermore, even the highly skilled test pilots of the National Advisory Committee on Aeronautics found it "impossible to stop these rough air excited oscillations" in the Bonanza (PX 22, 118a). The proof was that all aircraft do not have the same oscillation characteristics, and all do not pitch to the same degree (276a, 134c).

The court below states (Opinion, *infra*, p. 7a) "but the testimony was that the nose of the Bonanza does not drop of its own accord." This was the testimony of Beech's Chief of Aerodynamics, which itself was full of qualifications (51c). It was contradicted by Dommasch who stated that in view of the design of the Bonanza's unique "V" tail; it was possible that a pitching motion could be inadvertently induced by the pilot (232a-233a). It was also contradicted by his testimony that the NACA report showed a rapid nose down pitch and build up of speed associated with it (Transcript, p. 1762).

The court below then states (Opinion, *infra*, p. 8a) "the acceleration once the plane was in a nose down attitude was not extreme for an aircraft of clean design." Plaintiff's Exhibits 22, 42 and 72, discussed at pages 20-21, *supra*, were strikingly to the contrary.

The court below has read the evidence in the light most *unfavorable* to petitioners, contrary to the well established principle set forth in its own opinion (*infra*, p. 4a). Even on the claim of negligent design, petitioners proved a *prima facie* case.

More is at stake here than the interests of the parties to this controversy. The right to jury trial itself has been impaired. In the past this court has exercised its supervisory powers to prevent infringement of jury trial far

less sweeping and far less dangerous than occurred below. In *Union Trust Company* v. *Eastern Airlines, Inc.*, 350 U. S. 907, 76 S. Ct. 192 (1955), this court granted certiorari and summarily reversed an order of the Court of Appeals for the District of Columbia Circuit which set aside a jury verdict and ordered a new trial in a diversity action brought by the estates of deceased passengers against an airline.

In *Swofford* v. *Atlantic Coast Line R. R.*, 350 U. S. 807 (1955), a diversity of citizenship negligence action, this Court granted certiorari and summarily reversed the Court of Appeals for the Fifth Circuit which had reversed a jury verdict for plaintiff on the ground that the evidence required a finding that the accident had been due solely to the negligence of plaintiff's decedent.

In *Gibson* v. *Phillips Petroleum Company*, 352 U. S. 874, 77 S. Ct. 16 (1956), this court again granted certiorari and summarily reversed the reversal of a jury verdict and direction of a verdict for defendant by the Court of Appeals for the Fifth Circuit in a diversity negligence suit. In *Pokora* v. *Wabash Railway Co.*, 292 U. S. 98 (1934), cert. granted 290 U. S. 624 (1933), this court granted certiorari and reversed the affirmance of a directed verdict for the defendant, in a grade-crossing diversity case, on the ground that the plaintiff was guilty of contributory negligence.

In *Tenant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 35, 88 L. Ed. 525 (1943), an action brought under the Federal Employers Liability Act, this Court, finding "no reason * * * why we should abdicate our duty to protect and guard that rig[illegible] [jury trial]," granted certiorari and reversed a Circuit Court reversal of a jury verdict. In the exercise of its supervisory powers, this Court should correct the excesses below.

3. The decision below adversely affects the rights of many other litigants, present and future. It is improperly, though implicitly, based upon the findings of an administrative agency.

The Beechcraft Bonanza was manufactured and certificated under Part 3 of the Civil Air Regulations—the section of the Civil Air Regulations, promulgated by the Civil Aeronautics Board, applicable to most private airplanes and all private single-engine airplanes. The airplane meets all the standards of Part 3 and, largely for that reason, has been approved as "safe" by the Civil Aeronautics Administration (23c-26c). It meets all the specific tests that a Part 3 airplane is subjected to. Yet, even before the first Bonanza was sold, in 1947, Beech knew that it was unusually subject to structural failure in flight, particularly when being flown by an inexperienced pilot (PX 72, 368a, quoted, *supra*, p. 20).

From the time of its initial sale Bonanzas have come apart with alarming frequency. The accidents did not stop with the Prashker accident, which was number 46, but have continued at about the same rate. At the time the trial herein started (September, 1957) there had been 74 such accidents according to CAA and CAB reports in petitioners' possession. One Bonanza came apart in the air while the trial was on, and from October 9th, 1957, when the District Court directed a verdict through the end of 1957, four more disintegrated, making a total of 79 through the end of 1957, with no survivors of any of the accidents. Petitioners do not know how many have occurred since 1957.

These accidents have been investigated, some by the CAB, which is the agency that promulgated the standards, and some by the CAA, which granted the approval. They have been considered separately, one at a time. When thus viewed they have often appeared to be instances of pilot error—in flying into bad weather.

The petitioners herein were the first, so far as is known, to pinpoint the design of the airplane as the cause of these accidents. They were the first to discover that the Bonanza's rate of structural failure was 15 times the rate for all other comparable airplanes, despite the fact that the statistical material which demonstrated this fact was official CAA and CAB information which obviously had been available to these agencies, and which they had ignored.

Seven other actions arising out of Bonanza disintegration accidents are now pending.[10] If the evidence of other accidents is irrelevant in the *Prashker* case, it is presumably irrelevant in the other cases. Some of the other actions involve pilots who had instrument ratings and a perfect right to fly in instrument weather. Some involve the application of the law of comparative negligence. Yet, if the decision below stands, and particularly if the accident reports and statistical comparison are held to be "irrelevant", it is doubtful that any one of the plaintiffs in those cases can prove a case.

And, since there have been many other accidents, wherein suit has not been instituted, and accidents that have not yet happened but that will happen until the negligent situation is corrected, many other potential litigants will be denied just redress by virtue of the decision below.

In the briefs and arguments below respondents took the position that CAA approval of the airplane established due care on the part of respondents as a matter of law. (See, for example, Beech's brief below, pp. 3-5, 27.) The court expressed great interest in this proposition in its questions to counsel on the argument below. Yet in its

[10] In the United States District Court for the District of Delaware: *Cleminshaw* v. *Beech*, Civil No. 1067, *Mitchell* v. *Beech*, Civil No. 1783, *Day* v. *Beech*, Civil No. 1828, *Johnstone* v. *Beech and Atlantic*, Civil No. 1881, and *Van Alphen* v. *Beech*, Civil No. 2028. In the Delaware State Court: *Weissman* v. *Beech and Atlantic*, Civil No. 865 (also arising out of the Prashker accident), and *Wesson* v. *Beech*, Civil No. 1278.

opinion the court below carefully refrains from basing its decision on CAA approval. The court does say, in part (Opinion, *infra*, p. 7a) "any airplane certificated by the CAA as was the Bonanza must be statically stable." Petitioners would agree with this statement only with the qualification that the term, "statically stable," is used as defined in the Civil Air Regulations, and according to the very limited criteria used by the CAA in making the determination. Mr. Dommasch testified that the Civil Air Regulations, insofar as they apply to stability characteristics, were so general as to lose meaning completely. He said (transcript p. 1988):

> "* * * this cannot be in my opinion considered detailed. If you say a maximum should be 40 pounds, and there is no minimum, it is saying that the maximum weight of every human being will not exceed a thousand pounds and calling this descriptive of a human being or specific information.
>
> * * * * * *
>
> I do not criticize the regulations in any way, but I do hold that there is a great deal of room for producing a wide variety of characteristics; they are not tied down specifically; * * *"

To have recited in its opinion the patently erroneous doctrine advanced by respondents, that government approval establishes due care as a matter of law, would have been to have invited quick reversal by his Court. But we suggest that it is there just the same, even in addition to the specific reliance, indicated above, on the CAA's finding of static stability. There is no other reasonable way to explain the amazingly wrong decision of the court below (1) on the admission of evidence, (2) on contributory negligence as a matter of law, and (3) on the legal sufficiency of the evidence presented. The court below has arrogated to itself the power to decide that petitioners are not entitled to recover. It has done so with one eye on CAA approval and another eye on the practical consequences of

a verdict for the petitioners herein. It has usurped that power from the jury, guaranteed to petitioners by the Constitution. And it has taken the precious right of jury trial from other victims of these needless accidents, as well.

If this right can be impaired in the instant case because governmental agencies with presumed competence in the field have decided that an airplane is safe, or because the consequences of a plaintiffs' verdict are far reaching, then the structure of the jury system itself is threatened. The decision below represents a gross and alarming departure from our constitutional tradition of jury trial, which this Court should check here.

CONCLUSION

The decision below is grounded upon an apparent indifference to the jury's exclusive function and right to decide contested questions of fact. It is a gross and alarming departure from our constitutional jury tradition which should be checked here. If the many families affected are to be protected, if more than lip service to the jury system is to be compelled, and if the right of jury trial is to be guarded against the errosive effect of labelling obviously admissible evidence "irrelevant"—then the decision of the court below must be reviewed and reversed here. In the exercise of its supervisory jurisdiction, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,445

GOLDIE B. PRASHKER, EXECUTRIX OF THE ESTATE OF NATHAN PRASHKER, DECEASED, AND CHOICE EMBROIDERY & LACES, INC.,

Appellants,

v.

BEECH AIRCRAFT CORPORATION AND ATLANTIC AVIATION CORPORATION.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

Argued April 18, 1958

Before GOODRICH, McLAUGHLIN and STALEY, *Circuit Judges.*

Opinion of the Court

(Filed July 21, 1958)

By McLAUGHLIN, *Circuit Judge.*

Nathan Prashker was a young man, twenty-seven years old, unmarried, president of a family corporation, and the holder of a private pilot's license with some 215 hours flying time to his credit. On October 5, 1953 he undertook to fly from Allegheny County Airport near Pittsburgh to Cleveland, about 130 miles distant, with his cousin, a young man who was the father of several children. The visual flight plan filed with the Allegheny tower by Prashker called for a flight of approximately 42 minutes at 3,000 feet in a

Beechcraft Bonanza, N 2168 D, recently acquired by the family corporation and in which Prashker had logged some forty hours of flying time.

At the take-off point the ceiling was estimated as 1800 feet, visibility four miles with light rain and haze. At the Greater Pittsburgh Airport conditions were better with broken clouds at 3,000 feet, overcast at 9,000 feet, visibility 12 miles with light rain. At Cleveland the ceiling was 15,000 feet with broken clouds below that, visibility 12 miles. There is no indication other than that he was in the habit of doing so that the weather conditions actually were checked by Nathan Prashker.

N 2168 D with Nathan Prashker at the controls departed Allegheny County Airport at 12:09 P.M. headed in a northwest by west direction with instructions to use caution in passing through the Greater Pittsburgh area which had a lot of instrument traffic. At 12:22 the pilot called Allegheny tower by radio, advising that he was over the City of Pittsburgh at 2,300 feet, was unable to maintain visual references, and that he was into and climbing up through the overcast. Immediately after the tower had advised that their last report for the tops of the overcast had been 3,800 feet, Pittsburgh tower, who apparently had heard Prashker report, called Allegheny tower to advise that a jet reported the cloud tops at 33,000 feet. This information was relayed to N 2168 D and the pilot was then asked for his approximate position. Prashker replied tensely that he didn't know. He was asked if he wanted to return to the airport and he nervously said that he did but that he didn't know his position and that he was incapable of flying on instruments.

Immediately Allegheny tower asked Pittsburgh tower to take a direction-finding reading on N 2168 D's transmissions and the pilot was told to give a short count. The tower heard him give the count and his identification. Pittsburgh tower then told them to have the pilot steer 325 degrees magnetic; this was immediately relayed to the pilot with the

information that it would take him to Greater Pittsburgh Airport and that he should break out "in the vicinity of the river". The acknowledgement came as a broken and poor transmission. Allegheny tower repeated the steer and advised that the plane switch radio frequencies to work the Greater Pittsburgh Airport, but there was no acknowledgement. Repeated calls in the next minute were not answered.

Then at 12:27 an outside telephone call was received from a woman reporting that she and a neighbor had just seen an aircraft go behind a hill and that they thought it had crashed. Eight minutes later a man called to report that he and his co-workers had seen a wing fall off a plane and that the plane had crashed in Pangburn Hollow, near Elizabeth, Pennsylvania.

The crash scene was in a hilly, heavily wooded area near but out of sight of the Monongahela River, about 8 miles south-southeast of the Allegheny County Airport. The left wing was detached from the main body of wreckage and lay about 250 yards back along the flight path. The left stabilizer and part of the rudder were missing.

These actions were brought in Delaware against Beech Aircraft Corporation as the manufacturer of the Bonanza and against Atlantic Aviation Corporation as the seller of the aircraft, both of them Delaware corporations, by the executrix of the estate of Nathan Prashker and by Choice Embroidery and Lace Company, the Prashker family corporation, incorporated in New York, which owned the aircraft.[1] Jurisdiction is based on diversity of citizenship.

The claims against Atlantic are for breach of the implied warranty of merchantability and for negligent failure to warn of known dangerous propensities of the aircraft. Four allegations of negligence are made against Beech: (1) that the airplane was improperly designed; (2) that after receiving notice of the improper design it failed to make changes; (3) that there was a failure to include

[1] The executrix herself is a New Jersey resident; the decedent was a resident of Pennsylvania.

necessary safety devices; and (4) that there was a failure to warn of the prospective dangers. Additionally there is an allegation sounding in deceit that it was a conscious policy of Beech to disseminate false information as to the strength and safety of the Bonanza. There was further a claim against Beech for breach of warranty.

At the conclusion of a three week presentation of the plaintiffs' evidence, the trial court directed a verdict in favor of the defendants on the grounds that Nathan Prashker had incontrovertibly been contributorily negligent, thereby barring recovery on any claims of negligence, that there was no privity between Beech and the plaintiffs to sustain recovery on breach of warranty under the applicable law of Kansas, and that though there was an implied warranty of merchantability between Atlantic and the plaintiffs there could be no recovery thereon when the damage to the plaintiffs had been proximately caused by their own representative's contributory negligence.

It is a truism that on a motion by the defendant for a directed verdict at the close of the plaintiff's case, the evidence and all the inferences reasonably to be drawn therefrom must be viewed in the light most favorable to the plaintiff.

We consider first the matter of Nathan Prashker's contributory negligence. Because the harm occurred in Pennsylvania, that is the place of the alleged tort. The United States District Court of Delaware in a diversity action posing a conflict of laws question looks to the conflicts rule of Delaware to determine the law to be applied. Klaxon Co. v. Stentor Electric Mfg. Co., 314 U.S. 487 (1941). Delaware follows the usual course of looking to the law of the place of the alleged tort to determine the substantive rights of the parties arising thereform. Pack v. Beech Aircraft Co., 132 A.2d 54 (Del.S.Ct. 1957); Restatment, Conflict of Laws, §384. Thus, the law of Pennsylvania was applied by the District Court and will be looked to by us.

Appendix.

The Civil Air Regulations, which were put into evidence in this case, prohibit flying under instrument conditions by a pilot without an instrument rating and without recent practice.[2] A pilot without instrument qualifications must adhere to the visual flight rules. These prohibit flying when visibility is less than three miles or when the ceiling is less than 1,000 feet. Additionally they require that a visibility of three miles be maintained at all times while in flight and that the plane approach clouds no closer than 2,000 feet horizontally, 500 vertically under, and 1,000 feet vertically over.[3] The regulations do contain a provision, however, which permits departure from the other Regulations in event of emergency.[4] We mention the regulations of the Civil Aeronautics Board in order to establish impartial and authoritative criteria for judging the question presented to us.

The evidence shows that the necessity of prohibitions on flight under instrument conditions by unqualified pilots is dictated by the extreme likelihood of loss of control over the aircraft once visual points of reference become unavailable. This likelihood arises out of a vertigo induced by the movements of the aircraft in which the pilot becomes disoriented in space to the point where he has difficulty in distinguishing between right and left and up and down. Normal sense perceptions are unreliable to the point of being actively misleading. The plane can quickly go out of control in such circumstances. Even if the pilot can recognize what maneuver the out-of-control plane is performing his tendency is to over-correct. The consequence is for the plane again to go out of control, or if the correction is too violent resulting in an attempted maneuver for which the plane is not designed, to tear the plane apart in mid-air by reason of the extreme forces exerted on it.

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[2] 14 C.F.R. 43.65 and 43.68.
[3] 14 C.F.R. 60.30 and 60.31.
[4] 14 C.F.R 60.2.

Nathan Prashker knew, or certainly should have known, about and understood these and other factors involved in flight safety. Much of the literature put into his hands by the defendants at the time the Bonanza was purchased and afterwards emphasized the necessity for maintaining positive control over the aircraft at all times; it emphasized, too, the extreme danger of losing that control when instrument flight conditions were encountered by a pilot insufficiently skilled in coping with the difficulties peculiar to instrument flying. Nathan Prashker knew, too, that his craft was a faster, aerodynamically "cleaner" airplane than had been the three he had owned previously at various times, and that such an airplane could rapidly get into serious trouble if not skillfully operated. A fast, "clean" airplane is more difficult to fly, both on visual flight rules and on instruments because it responds to control quickly and easily. The control exercised must, therefore, be skilled. In fact, Nathan Prashker doubtless had the skill requisite to handle the Bonanza so long as he remained within the limitations imposed by the visual flight rules and stayed out of instrument conditions.

The facts, however, demonstrate that Nathan Prashker, wittingly or not, made a number of decisions involving bad judgment which set the stage for the ensuing tragedy. To begin with he elected to take off from the Allegheny County Airport in marginal weather conditions, judged by the visual flight rules. He thus assumed the risk of getting into poorer flight conditions, even though he undoubtedly hoped and may even have assumed that they would improve. It is inferable from the time-intervals involved that he shortly did encounter worsening conditions and that he turned back toward Pittsburgh. Over the city he made the grievous mistake of electing to go into the overcast in an attempt to climb through it.

There was elicited on cross-examination from a part-time employee of Atlantic's, who was also an airlines pilot of some 10,000 hours experience, testimony that he had

never encountered a weather condition which he could not have avoided either by going around, by turning back, or presumably by staying on the ground in the first place. It is apparent, then, that what are alleged to be defects in the Bonanza only become significant because Prashker had gotten himself into a situation in which causes beyond his ability to control inexorably commenced to operate.

A decision based on Prashker's contributory negligence alone would depend on a preliminary holding that the evidence would not support an inference that bad weather may have closed in on him even though he was exercising due care for his own safety. We incline to the view that no such inference is available, but concede that the question may be arguable. Therefore, and because the case has been so thoroughly and well presented to us, we prefer to rely also on an alternative ground for decision. We think that no negligence can be imputed to the defendants.

Plaintiffs asserted that the Bonanza had been negligently designed; they have attempted to spell out three specific defects. The first of these alleged defects is that the Bonanza model involved is subject to a lateral oscillation of some two or three degrees on either side of a norm in rough-air flight, and that this oscillation induces vertigo whenever visual references become unavailable. But there was undisputed evidence that any aircraft under similar flight conditions is subject to some lateral oscillation. The conclusion is that, although the existence of oscillations may explain how vertigo is induced, vertigo cannot be avoided except by avoiding the loss of a visual reference; in instrument flight the reference is supplied by the instruments which in their use require a degree of skill amounting to an art.

Another alleged defect was that the plane tended to assume a nose-down attitude and once in that position accelerated dangerously. But the testimony was that the nose of the Bonanza does not drop of its own accord. Any airplane certificated by the C.A.A. as was the Bonanza must

be statically stable. The acceleration once the plane was in a nose-down attitude was not extreme for an aircraft of clean design; again this particular aircraft required a measure of skill in flying it, and Nathan Prashker apparently had that skill so long as he remained within the limitations of the visual flight rules as he was required to do. Plaintiffs allege that the Bonanza would have been a safer plane had it been equipped with dive brakes. Beech had in fact considered the use of dive-brakes but had abandoned the idea largely because much the same result could be achieved by extending the landing gear. It is doubtful in the extreme that Nathan Prashker would have thought to use the dive brakes even had they been installed because the landing gear was still retracted after the plane had crashed.

The third alleged defect of which plaintiffs complain is that stick-loads were dangerously light. They are important in preventing the pilot, when under stress, from violently moving the controls, thereby imposing such stress on the plane structure in its attempt to respond that it disintegrates. It appeared, however, that the Bonanza's stick-loads exceeded those imposed by the military for their aircraft designed to perform more violent maneuvers than is the Bonanza.

In short all these alleged defects were either nonexistent or present to an unavoidable extent known to Nathan Prashker. Heeding the fundamental warning against an unqualified pilot's getting into instrument conditions is the surest means to avoid unintentionally exceeding the inherent restrictions in the design of any aircraft. That Nathan Prashker could have violated that tenet without negligence on his part does not, of course, make the defendants liable absent negligence on their part. Even if it can be said that there is a duty to warn of the dangers in exceeding the inherent restriction in any aircraft, that duty was adequately discharged by the warnings to avoid instrument flight conditions which would be the

only anticipatable way the restrictions could be unintentionally exceeded by a pilot.

We turn now to a consideration of the claims for breach of warranty. Again the conflicts rule of Delaware is looked to in order to determine what law shall be applied to judging these claims arising out of contract. No reason is perceived why Delaware would refuse to apply the law that the parties have stipulated to be the governing law by reason of the contract of sale of the airplane having been entered there by Beech as seller and Atlantic as buyer. Cf. Wilmington Trust Co. v. Wilmington Trust Co., 24 A. 2d 309 (Del. Ch. 1942). The law of Kansas will, therefore, be applied to determining the breach of whatever warranties accompanied the sale.

We think on the basis of the foregoing discussion dealing with the physical limitations on airplane design, that the plaintiffs' evidence concerning breach of warranty was insufficient to go to the jury. The evidence fails to demonstrate any breach of either an express or implied warranty by Beech. We therefore pass without deciding the question of whether the law of Kansas would require privity between Beech and the plaintiffs.

As for the claimed breach of the implied warranty of merchantability between Choice and Atlantic, we apply, through the Delaware rule of conflicts, the law of New Jersey where the sale occurred, both for construing the contract, Harris v. N.Y. Life Insurance Co., 33 A.2d 154 (Del. Ch. 1943). Lams v. F. H. Smith Co., 178 A. 651 (Del. Super. 1935), and for ascertaining damages arising from any breach, Canadian Industrial Alcohol Co. v. Nelson, 188 A. 39 (Del.S.Ct. 1936).

The measure of damages which Choice asserts is the value of the airplane, and not simply the difference in value between the aircraft at the time it was sold and the value of a similar plane free from the alleged defects making the plane unmerchantable. The measure of damages for a breach of warranty is, under New Jersey law, the loss

directly and naturally resulting in the ordinary course of events from such breach. DeRose v. Hunter Lindsay Corp., 41 N.J. Super. 178 (App. Div. 1956); Somerville Container Sales v. General Metal Corp., 39 N.J. Super. 348, amended 39 N.J. Super. 562 (App. Div. 1956). The inescapable inference is that the damage complained of must stem from the breach of warranty and not from some other cause. Thus, it is clear that if the damage to the plane was proximately caused by the negligence of Choice's pilot, Choice cannot recover. Cf. Heath v. Channel Lumber Co., Inc., 25 N.J. Super. 6, (App. Div. 1953). But since we have not rested our decision as to the negligence issues solely on Nathan Prashker's contributory negligence, neither do we do so on this point; again, the plaintiff's evidence fails to prove that the plane was not reasonably fit for flying.

One point remains for discussion and decision. Plaintiffs complain of the trial court's ruling which prevented them from putting into evidence the reports of forty-five fatal accidents involving structural failure in flight of Bonanzas both on the issue of cause and on the issue of notice. The court permitted the introduction of only seven of the accident reports limited solely to the issue of notice of the alleged defects. The plaintiffs also offered evidence, which was rejected on both issues, of government satistics known to Beech that over a six year period prior to the accident in question the Bonanza had a rate of structural failure in flight approximately fifteen times the rate for all other single engine civil aircraft.

The first issue confronting the trial court upon the offer of the reports was whether evidence of accidents to one model of the Bonanza could be relevant as to the cause of accidents in other models. The court was justified in putting the plaintiffs to their proof that the five different Bonanza models involved in the series of accidents were similar. The court ultimately decided that the models were more like each other than like any other airplane.

At the same time the court was justified in excluding evidence as to accidents to the first model. The sum of the changes made in the design of the first model through four subsequent models permitted the trial court to regard the first and fifth planes as dissimilar aircraft. Evidence of accidents in the first model would not have been sufficiently material to the cause of accidents in the fifth model to require its admission. The two most significant changes from the preceding models occurred between the first and the second and between the third and fourth. The first of these changes involved increasing the limit design load factor from 3.8 G's to 4.4 G's which moved the plane from the C.A.A.'s normal category to the utility category for certification purposes. At the same time gross weight was increased. These changes improved the structural strength of the airplane. The second significant change was to the dihedral and area of the tail which affected the plane's handling characteristics.

The second issue confronting the trial court, once it had initially determined what models for purposes of the case were identical and which reports could therefore be relevant and material, was to decide whether the accident reports were indeed relevant on the issues for which they were offered. The court found that on the issue of notice of possible defects the reports were relevant, but that as to the cause of this accident they were irrelevant. Similarly the statistics were ruled irrelevant.

The determinations of irrelevancy were proper. Each accident report involved an instance of structural failure in flight where the airplane was, as plaintiffs assert, "pulled apart by loads in excess of its stress limitations." And yet the stress limitations exceeded those which the Civil Aeronautics Administration required as sufficient to assure flight safety. Showing that the planes came apart is not enough because of the compromise required with structural strength in designing an aircraft which will get off the ground. To be relevant on the issue of causation attribut-

able to a design defect the accident reports would have had to show at least that the planes involved had not gone out of control prior to their coming apart, or if they had gone out of control, that it had been without fault by the pilot. The seven reports in evidence—and they may be assumed best to present the plaintiffs' case—invariably involve pilots unqualified to fly under instrument conditions who nonetheless were in such conditions or, in a few instances involving the unadmitted reports, pilots qualified for instrument flight who were in turbulent weather when the accidents occurred. To hold the aircraft responsible on such evidence would be utterly to disrgard the factor of human fallibility known inevitably to occur in such circumstances and would be patently unjustified. The reports, therefore, do not tend to prove the existence of a defect in design of the Bonanza. The cases cited by plaintiffs on the admissibility of prior occurrences as evidencing existence of a dangerous condition are consequently inapposite.

The statistic as to rate of structural failure of the Bonanza is, on its face, startling. But it involves the same accidents which were the subjects of the reports above discussed. In view of what amounts to an explanation of each accident which contributed to the ultimate statistic, that statistic itself has no relevance as notice to Beech of the existence of a defect. As to the issue of causation by a design defect, the statistic tends to prove nothing more than the individual accident reports. It is extremely dubious, in fact, whether statistic involving probabilities as to causation have any significance at all when applied to a particular incident.

Even were it assumed that the accident reports and statistics prove the Bonanza to be accident-prone under conditions of turbulence in instrument flight, probably the warning to stay out of such conditions and emphasizing the consequences of ignoring it would be enough. By "accident-prone" is meant that the plane has some characteristics which may, when a pilot loses visual reference, call upon

him for a much greater degree of skill than theretofore he had been required to exercise in controlling the airplane. If he has the skill and can make the adjustment quickly, he is safe. If the characteristics of the plane take it out of control before he adjusts, he is in serious trouble. If it is possible to get into turbulent instrument flight conditions despite the exercise of due care, then the pilot can be said, in view of the warning, to have assumed the risk of the accident proneness every time he flies subject to the possibility that he may encounter turbulent instrument conditions.

The limitation on introducing the evidence offered of other accidents for the purpose of showing notice of defects to Beech was, at the least, a proper exercise of the trial judge's discretion in conducting the course of the trial.

The judgment is affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Judgment.

Present: GOODRICH, MCLAUGHLIN and STALEY,

Circuit Judges.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

HARRIET G. HUMPHRYS,
Chief Deputy Clerk.

July 21, 1958.

Opinion Sur Petition for Rehearing.

Present: GOODRICH, MCLAUGHLIN and STALEY,

Circuit Judges.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court

Circuit Judge
MCLAUGHLIN.

Dated: August 7, 1958.